Mars Telecommunications Sdn Bhd v Cubic Electronics Sdn Bhd (in liquidation)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-(NCC)(W)-563–04 OF 2015
ROHANA YUSUF, PRASAD ABRAHAM JJCA AND ZALEHA YUSOF J
12 JULY 2017

Contract — Sale and purchase of property — Deposit — Appellant failed to sign sale and purchase agreement within agreed time — Respondent forfeited deposits — Whether respondent entitled to forfeit earnest deposits as liquidated damages — Whether respondent entitled to forfeit interest paid by appellant — Whether respondent entitled to counterclaim for utility payments — Contracts Act 1950 s 75

The respondent was the owner of a piece of land located in Malacca whereas the appellant was one of the tenants in the respondent's land. The respondent was wound up and liquidators were appointed to manage the affairs of the respondent. The liquidators had carried out public tender for the sale of the respondent's land and the appellant had made an offer to purchase the land together with the assets for the consideration of RM90m. Based on the information memorandum, the appellant would have to pay an earnest deposit upon the acceptance of its offer by the respondent and the sale and purchase agreement ('the SPA') was to be executed within one month from the date of acceptance unless extended by the liquidators at their absolute discretion. The offer was accepted by the respondent and the appellant had paid RM1m to the respondent as earnest deposits. Upon the request by the appellant, the respondent granted extension of time for the signing of the SPA but with the condition that further deposits to be paid by the appellant to the respondent. Four extensions were granted by the respondent and the appellant had paid RM500,000 respectively for each extension. A non-refundable RM40,000 interest was also paid by the appellant for the fourth extension granted by the respondent. Subsequently, a further request for extension by the appellant was rejected by the respondent. Up to then, the appellant had made a total payment of RM3m plus RM40,000 as interests. Upon the failure of the appellant to execute the SPA on 25 January 2012, the respondent forfeited the total RM3m paid plus the interests of RM40,000. The appellant then filed an action in the High Court claiming for breach of tenancy agreement, compensation for tenancy due from the subtenant, a declaration that the forfeiture of the total payment of RM3,040,000 was unlawful, and alternatively the respondent was only entitled to forfeit RM1m earnest deposit paid and the refund of the other part of the payment. The learned trial judge found in favour of the respondent, hence the present appeal. The grounds of appeal as submitted by the appellant

were whether the learned judge was correct in holding that: (a) the respondent was entitled to forfeit the earnest deposit in the sum of RM3m as liquidated damages; (b) the respondent was entitled to claim interest of RM40,000 from the appellant; and (c) the respondent was entitled to counter claim for utility payments in the sum of RM503,876.10 from the appellant.

Held, allowing the appellant's appeal in part:

(1) There was no agreement made by the appellant that the payments made were purely deposit and hence liable to be forfeited. The learned judge had fallen into error in finding that the amount paid by the appellant were all agreed to by the appellant as pure deposits. In forfeiting the payment made, the respondent not only failed to adduce any evidence to prove that they suffered any damage, they had also failed to prove that the whole sum forfeited was a reasonable compensation which the respondent would be entitled to forfeit, as envisaged by s 75 of the Contracts Act 1950. At the point of entering into agreement it was only RM1m that was agreed as an earnest deposit. Therefore, the amount that was liable to be forfeited by the respondent in the present case was only be the RM1m earnest deposit (see paras 24–25 & 27–28).

(2) The RM40,000 interest claimed by the respondent was for the delay in the payment of the total earnest deposit under the SPA which was based on the balance of deposit of RM6m. Since the SPA had not been executed, the deposit under the SPA was not due to be paid. Therefore, the learned judge had erred in allowing the respondent to forfeit the interests of RM40,000 (see para 29).

(3) Since the land was sold subject to tenancies, the appellant's subletting would continue to subsist. With the tenancy subsisting the appellant would continue to collect utility payments from the subtenant and the appellant therefore could not claim this sum from the respondent. The learned judge was therefore correct in his finding on the counterclaim. There was no appealable error on this issue that warranted appellate interference (see para 31).

[Bahasa Malaysia summary

Responden adalah pemilik sebidang tanah terletak di Melaka di mana perayu adalah salah seorang penyewa atas tanah responden. Responden telah digulungkan dan penyelesai-penyelesai telah dilantik untuk menguruskan urusan responden. Penyelesai-penyelesai tersebut telah menjalankan tender awam untuk jualan tanah responden dan perayu telah membuat tawaran untuk membeli tanah tersebut bersama dengan aset-aset untuk balasan RM90 juta. Berdasarkan memorandum maklumat, perayu perlu membayar deposit simpanan selepas penerimaan tawarannya oleh responden dan perjanjian jual beli ('PJB') perlu disempurnakan dalam tempoh satu bulan dari tarikh

penerimaan kecuali dilanjutkan oleh penyelesai-penyelesai atas budi bicara mutlak mereka. Tawaran itu telah diterima oleh responden dan perayu telah membayar RM1 juta kepada responden sebagai deposit simpanan. Setelah dipohon oleh perayu, responden telah memberikan lanjutan masa untuk tandatangan PJB tersebut tetapi dengan syarat agar deposit selanjutnya dibayar oleh perayu kepada responden. Empat lanjutan telah diberikan oleh responden dan perayu telah membayar RM500,000 masing-masingnya untuk setiap lanjutan. Faedah RM40,000 yang tidak boleh dikembalikan juga telah dibayar oleh perayu untuk lanjutan keempat yang diberikan oleh responden. Berikutan itu, permohonan selanjutnya untuk lanjutan oleh perayu telah ditolak oleh responden. Sehingga itu, perayu telah membuat bayaran berjumlah RM3 juta beserta RM40,000 sebagai faedah. Setelah perayu gagal untuk menyempurnakan PJB tersebut pada 25 Januari 2012, responden telah melucuthakkan sejumlah RM3 juta yang dibayar beserta faedah RM40,000. Perayu kemudian telah memfailkan tindakan di Mahkamah Tinggi mendakwa pelanggaran perjanjian sewa, pampasan untuk sewa yang kena dibayar dari sub-penyewa, satu deklarasi ahawa pelucuthakan bayaran keseluruhan RM3,040,000 adalah menyalahi undang-undang, dan secara alternatif responden hanya berhak untuk melucut hak RM1 juta deposit simpanan yang dibayar dan pengembalian sebahagian lain bayaran tersebut. Hakim perbicaraan yang bijaksana adalah betul dalam memutuskan bahawa: (a) responden berhak untuk melucuthak deposit simpanan berjumlah RM3 juta sebagai ganti rugi jumlah tertentu; (b) responden berhak menuntut faedah RM40,000 daripada perayu; dan (c) responden berhak menuntut balas untuk bayaran utiliti berjumlah RM503,876.10 daripada perayu.

Diputuskan, membenarkan sebahagian daripada rayuan perayu:

(1) Tiada perjanjian dibuat oleh perayu bahawa bayaran-bayaran yang dibuat adalah deposit semata-mata dan justeru boleh dilucuthak. Hakim yang bjaksana telah terkhilaf kerana mendapati bahawa jumlah yang dibayar oleh perayu telah kesemuanya dipersetujui oleh perayu sebagai deposit semata-mata. Dalam melucut hak bayaran yang dibuat, responden bukan sahaja gagal untuk mengemukakan apa-apa keterangan untuk membuktikan bahawa mereka telah mengalami apa-apa ganti rugi, mereka juga gagal untuk membuktikan bahawa keseluruhan jumlah yang dilucuthak adalah pampasan yang munasabah yang mana responden berhak untuk melucuthakkan, sepertimana termaktub dalam s 75 Akta Kontrak 1950. Pada masa memasuki perjanjian hanya RM1 juta telah dipersetujui sebagai deposit simpanan. Oleh itu, jumlah yang patut dilucuthak oleh responden dalam kes ini hanyalah RM1 juta deposit simpanan (lihat perenggan 24–25 & 27–28).

(2) Faedah RM40,000 yang dituntut oleh responden adalah untuk kelewatan dalam bayaran jumlah deposit simpanan di bawah PJB tersebut yang mana berdasarkan baki deposit RM6 juta. Oleh kerana PJB

tersebut tidak disempurnakan, deposit di bawah PJB tersebut tidak perlu dibayar. Oleh demikian, hakim yang bijaksana terkhilaf dalam membenarkan responden melucuthak faedah RM40,000 tersebut (lihat perenggan 29).

(3) Oleh kerana tanah itu telah dijual tertakluk kepada penyewaan-penyewaan, sub-penyewaan oleh perayu perlu terus kekal. Dengan wujudnya penyewaan yang masih ada perayu perlu berterusan mengutip bayaran utiliti daripada sub-penyewaan itu dan perayu dengan itu tidak boleh menuntut jumlah ini daripada responden. Hakim yang bjaksana oleh itu adalah betul dalam dapatan beliau berhubung tuntutan balas tersebut. Tiada kesilapan yang boleh dirayu berhubung isu ini yang mewajarkan campur tangan rayuan (lihat perenggan 31).]

Notes

For cases on deposit for sale and purchase of property, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6796–6799.

Cases referred to

Hadley v Baxendale [1854] 9 Exch 341 (refd)
Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 4 MLJ 445; [2009] 4 CLJ 569, FC (refd)
Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89, PC (refd)
Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501, FC (folld)
Morello Sdn Bhd v Jaques (International) Sdn Bhd [1995] 1 MLJ 577, FC (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817; [1995] 2 CLJ 374, FC (refd)
Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd [1987] 2 MLJ 711, SC (refd)

Legislation referred to

Contracts Act 1950 s 74
Contracts Act 1872 [IND] s 75

Appeal from: Suit No 22NCC-115–01 of 2013 (High Court, Kuala Lumpur)

Ravi Nekoo (Abdul Hakem Arabia and M Monaganambal with him) (Hakem Arabi & Assoc) for the appellant.
Wong Chee Lin (Skrine) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] The respondent in this appeal was the owner of a piece of land held under PT No 6960, HS (M) No 725, Mukim Bukit Katil, Daerah Melaka Tengah, Negeri Melaka which is 1,234,197 sqft in area ('the land') together with plants and machineries ('the assets') thereon. The land was charged to OCBC Bank (M) Bhd ('OCBC'), as a secured creditor of the respondent. OCBC presented a petition to wind up the respondent and was granted by Shah Alam High Court on 25 July 2011. Two liquidators were appointed to manage the affairs of the respondent thereafter.

[2] The appellant was one of the tenants of the respondent prior to the winding up. The appellant had sublet its tenanted area to University Teknikal Malaysia Melaka, which operated its university campus over the sublet area.

[3] In exercise of their duties, the liquidators on behalf of the respondent carried out a public tender for the sale of the land together with the assets thereon. For that purpose, an information memorandum dated 15 September 2011 was prepared (see pp 35–54 of the core bundle). The sale of the land was to be on an 'as is where is' basis, subject to all existing tenancy agreements (see p 38 of the core bundle). The tender exercise was to be closed on 14 October 2011.

[4] The appellant made an offer to purchase the land together with the assets for a total consideration of RM90m, with an earnest deposit of RM1m to be paid. The consideration of RM90m was made up of RM80m for the land and RM10m for the assets. The offer was accepted by the liquidators because it was higher than the valuation made by their appointed valuers. The tender was then aborted.

[5] Vide a letter of acceptance to the appellant dated 7 October 2011 (see pp 70–71 of the core bundle), the respondent accepted the offer on the terms containing in the information memorandum (see pp 35–71 of the core bundle). Both parties were represented by solicitors where the respondent was represented by Messrs Skrine & Co and the appellant by Messrs Jayaratnam & Partners.

[6] Amongst the terms of the offer in cl 2.6 of the information memorandum, a sale and purchase agreement ('SPA') must be signed within 30 days from the letter of acceptance dated 7 October 2011. The due date for the execution would therefore be 6 November 2011. The acceptance was subjected to the terms in the information memorandum. We reproduce below the relevant clauses of the terms governing the parties at this stage, for better appreciation of the issues raised. We have also highlighted the more pertinent

clauses in bold.

2.5 Earnest Deposit

2.5.1 (a) All offers for the Property must be accompanied by a sum equivalent to 2% of the Offer Price (hereinafter referred to as 'ED'). The Offer Price shall be in Ringgit Malaysia ('RM').

(b) All offers for the Machinery must be accompanied by a sum equivalent to 10% of the Offer Price (hereinafter referred to as 'ED'). The Offer Price shall be in Ringgit Malaysia ('RM').

(c) The ED is to be paid by way of a bank draft or cashier's order made out in favour of 'CUBIC ELECTRONICS SDN BHD (IN LIQUIDATION)' and sent to:

Cubic Electronics Sdn Bhd (In Liquidation)

c/o BDO Consulting Sdn Bhd

12th Floor, Menara Uni. Asia

1008, Jalan Sultan Ismail

50250 Kuala Lumpur

Malaysia

Any offer not accompanied by the prescribed ED will NOT be considered.

2.5.2 **Upon issuance of the LOA to the Purchaser(s), the ED shall be treated as payment of the deposit and/or applied towards the Offer Price. In the event one (1) of the offers is successful, the Liquidators reserve the right to use the total ED as part payment for the Successful Offer Price.**

2.5.3 Where the Purchaser(s) fails to sign the SPA pursuant to Section 2.6, the Liquidators shall reserve the rights to cancel the sale and absolutely forfeit the ED paid pursuant to Section 2.5.1 as agreed liquidated damages and not by way of penalty.

2.5.4 ED of the tenderer(s), who withdraw their offers prior to being notified of the outcome by the Liquidators, will be forfeited.

2.5.5 ED will be refunded to the tenderer(s), free of any interest, if their offers are not accepted by the Liquidators, in accordance with Section 2.13.4.

2.6 Sale of the Property or Property and Machinery

2.6.1 **The SPA must be signed within thirty (30) days of the Liquidators' notification to the Purchaser(s) that his/her respective offer has been accepted unless otherwise**

extended by Liquidators at their absolute discretions. A deposit of 10% of the Offer Price ('the Deposit') is payable upon execution of the SPA. In this regard, the ED pursuant to Section 2.5 shall be applied towards the payment of the Deposit.

2.6.2 Any provisions in the SPA which are in addition to or different from the terms set out in this Memorandum shall be subject to the sole agreement of the Liquidators.

2.6.3 Payment in Ringgit Malaysia of the balance (ie Offer Price less the Deposit) must be made to:

Cubic Electronics Sdn Bhd (In Liquidation)

c/o BDO Consulting Sdn Bhd

12th Floor, Menara Uni Asia

1008, Jalan Sultan Ismail

50250 Kuala Lumpur

Malaysia

via a bank draft or cashier's order within 3 months from the date of the SPA or within 14 days of the fulfilment or waiver of the agreed conditions precedent (if any), whichever is later unless otherwise extended by the Liquidators at their absolute discretion.

2.6.4 **Where the Purchaser(s) fails to pay in full the balance within the prescribed time in accordance with Section 2.6.3, the Liquidators shall reserve the rights to cancel the sale and forfeit the Deposit made pursuant to Section 2.6.1 as agreed liquidated damages and not by way of penalty.**

[7] From the above clauses, the appellant would have to pay an earnest deposit under cl 2.5 upon acceptance of its offer by the respondent and the SPA was to be executed within one month from the date of acceptance unless extended by the liquidators at their absolute discretion. Only upon signing of the SPA cl 2.6.1 will kick in where, a 10% deposit pursuant to the SPA would have to be paid by the appellant/purchaser.

[8] On 3 November 2011, the appellant paid the RM1m as earnest deposit presumably pursuant to cl 2.5. The next day, on 4 November 2011 by the solicitors' letter from Jayaratnam & Partners to Skrine, the appellant sought for an extension of time until 23 November 2011 ('the first extension') to execute the SPA. The extension was duly granted by the liquidators on the condition that a further deposit of RM1m be made and if on the date of 23 November 2011, the SPA is not executed, the aggregate deposit of RM2m will be forfeited as agreed liquidated damages and not by way of penalty.

A **[9]** The appellant in turn requested for a reduction of the requested RM1m payment to RM500,000 instead. This was accepted by the respondent with a caution that if the SPA is not executed on 23 November 2011, the deposit in total of RM1.5m will be forfeited (see pp 171–172 of the core bundle). On 11 November 2011, the appellant paid the sum of RM500,000.

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[10] Thereafter, there were another three further requests for extension made by the appellant. The second extension was agreed with a further payment of RM500,000 and the signing of SPA was extended to another month to 23 December 2011. The respondent cautioned the appellant again C that the amount would be treated as deposit and liable to be forfeited. Another extension ensued for the third time to another month to 23 January 2012 when the respondent agreed, and a payment of RM1m was made. Yet again the extended date of 23 January 2012 was sought to be further extended to 25 January 2012 by the appellant, which was agreed to by the respondent with D the same caution. This time an agreed non-refundable interest of RM40,000 was also imposed and paid by the appellant. The appellant was told that 25 January 2012 would be the final extension. A further request to extend to 24 February 2012 was rejected by the respondent.

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[11] Up to then, and in all the appellant had made a total payment of RM3m plus RM40,000 as interests. Upon the failure of the appellant to execute the SPA on 25 January 2012, the respondent forfeited the total RM3m paid plus the interests of RM40,000.

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[12] Apart from the above narration, the appellant claimed that it was also sued by another party MKC Corporate & Business Advisory Sdn Bhd ('MKC') on the ground that the appellant had entered into the tenancy agreement with the respondent wrongly.

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[13] The appellant in fact filed a suit against the respondent and the second defendant ('OCBC'). The suit against the second defendant was withdrawn. Against the respondent the appellant was claiming for breach of tenancy agreement, compensation for tenancy due from the subtenant ('UTEM'), a H declaration that the forfeiture of the total payment of RM3.04m was unlawful, and alternatively the respondent was only entitled to forfeit RM1m earnest deposit paid and the refund of the other part of the payment. In fact the pleadings filed by the appellant was so convoluted with other side issues, and so verbose, making a simple complaint so complex. We would refrain ourselves I from making any further comment on the claim made, since they are not relevant for the purpose of the appeal before us.

[14] Before us learned counsel for the appellant confined the complaints of the appellant into three main grounds of appeal which we rephrased as below:

(a) whether the learned judge was correct in holding that the respondent was entitled to forfeit the earnest deposit in the sum of RM3m as liquidated damages;

(b) whether the learned judge was correct in holding that the respondent was entitled to claim interest of RM40,000 from the appellant; and

(c) whether the learned judge was correct in holding that the respondent was entitled to counterclaim for utility payments in the sum of RM503,876.10 from the appellant.

OUR DECISION

[15] On the first issue, the appellant premised its submission on the basis that the forfeiture of the RM3m was in contravention of s 75 of the Contracts Act 1950. In the alternative, by its pleadings the appellant agreed that the RM1m only would be liable to be forfeited as deposit and the balance should be refunded to the appellant.

[16] Generally speaking, s 75 of the Contracts Act 1950 does away with the distinction between liquidated damages and penalties as understood under English law. The Federal Court in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; [1995] 2 CLJ 374 sets out the guiding principles in construing the application of s 75. In that case the facts of which were these. Both parties were medical practitioners. The respondent sold his medical practice to the appellant in 1988 for RM120,000 to be paid by installments. A total of RM96,000 had already been paid including RM12,000 earnest money when the appellant defaulted the last six. The agreement contained a forfeiture clause which allowed all monies paid to be forfeited upon breach, as liquidated damages. The respondent forfeited the whole of RM96,000 upon breach by the appellant under the forfeiture clause. The Federal Court having gone through a list of Indian cases dealing with s 74 of the Contracts Act which is in pari materia, held that the whole sums paid cannot be retained unless there was proof by evidence that there was loss or damage that was suffered.

[17] The principles laid down in *Selva Kumar* were reaffirmed by the Federal Court in *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445; [2009] 4 CLJ 569. The case involved a sale and purchase of two lots of lands for a price consideration of RM4.59m and RM10.83m each. The purchase price was to be paid by six installments. Initial payment of 12% was made and subsequently there was payment up to 50% of the purchase price. The High Court ordered the appellant to refund the whole amount as no actual damage was proved, to justify the forfeiture made by the respondent therein. The Court of Appeal allowed the appeal in part by ordering that the appellant

A was entitled only to the 12% paid as deposit. The Federal Court agreed with the Court of Appeal that the 12% paid was an earnest deposit and the respondent was entitled to forfeit the same. The other payment on top and above that, was ordered to be refunded. The Federal Court then reaffirmed the decision in *Selva Kumar* and declared that it is still good law on the application B and operation of s 75.

[18] The principle enunciated by the Federal Court is that in relation to a purchase of property, no vendor can recover or retain all sums paid under a C contract of sale of property and at the same time retain the property, without proof by evidence of the extent of loss or damage he suffers, as a result of a breach by the purchaser. In essence the distinction between liquidated damages and penalty has ceased to be of any legal importance because the end result in either case is that, the court must determine what amounts to a reasonable D compensation. The legal position was further reaffirmed in *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501.

E **[19]** In effect the Federal Court in both *Selva Kumar* and *Johor Coastal Development Sdn Bhd* held that, there is a need to prove actual damage or reasonable compensation in accordance with the principle in *Hadley v Baxendale* [1854] 9 Exch 341, before the amount stipulated in a contract can be forfeited upon breach. Thus whether or not the sum stipulated in a contract F is a penalty or otherwise is a matter of construction. Unless the court is satisfied that the stipulated sum is a genuine pre-estimate representing a reasonable sum of loss suffered, then only will it allow the sum to be paid as damages. As a general rule under s 75, damage must first be established. A party claiming for damages then must prove his loss.

G **[20]** Returning to the instant appeal, it is observed that the communication between parties, the respondent had indeed issued caution that the failure to adhere to the term would liable itself to a forfeiture of payment made at every of the extensions granted, at least four times.

H **[21]** What is clear in the present case was that no evidence was adduced before the court to support a case that this amount would represent the damages suffered by the respondent from the breach by the appellant or a genuine pre-estimate of loss as required under s 75. The learned High Court I judge in respect of this issue held as follows:

> [24] I also agree that the first defendant had every right to forfeit the deposits in total of RM3m which was paid by the plaintiff. The plaintiff is totally aware that the deposits were forfeited as agreed liquidated damages and not penalty as it was informed by the first defendant before the deposits were paid. I also agree that the

deposits being forfeited do not contravene s 75 of the Contracts Act 1950 which states:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

[25] The court is of the finding the deposits paid amounting to RM3m are true deposit, where the first defendant need not prove loss or damage. Therefore the above provision of the Contracts Act 1950 is not applicable. The deposits paid are earnest deposit as agreed by the parties.

[22] From the above paragraphs, it became clear that the learned judge had made his finding that the payments made by the appellant were agreed to by the parties as deposits and not penalty. Following that finding the learned judge held that s 75 was of no application, because deposits are liable to be forfeited without proof of damages. The learned judge then referred to a line of cases in support of that legal position. The first case was *Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711, followed by the Federal Court's case of *Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 1 MLJ 577. The third is the decision of the Privy Council in *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 where deposit can be forfeited on the default of the purchaser despite the vendor not in a position to prove actual damage flowing from the purchaser's breach of the contract.

[23] We agreed with the learned judge on the legal position that deposits are generally speaking, liable to be forfeited without proof of damage. However we are not able to appreciate the conclusion arrived at by the learned judge that the amount paid by the appellant was all agreed to by the appellant as deposit. The learned High Court judge had not given any reason why he concluded that both parties agreed for the payment to be an earnest deposit.

[24] What we could discern from the communication between parties on the payment made by the appellant was that, at every request for extension of time the respondent had stated that the amount paid would be treated as deposit and would be liable to be forfeited. This the respondent did without fail, on each time the respondent granted for a request of extension. The first extension was granted with an imposition of RM1m which was negotiated downwards to RM500,000. Besides the repeated caution made by the respondent at each occasion of extension we did not find an agreement made by the appellant that they were purely deposit and hence liable to be forfeited.

A **[25]** At the point of entering into agreement it was only RM1m that was agreed as an earnest deposit. The liability to pay an agreed deposit of RM9m as suggested by learned counsel for the respondent had not arisen as the SPA had not been executed. At the point in time the liability of the appellant to pay was an earnest deposit as stipulated under cl 2.5 of the information memorandum B which we have alluded to above. Offer for the property ('the land') was made at RM80m hence 2% of it would be RM1.6m. The offer for the assets was RM10m hence 10% of it would be RM1m. The appellant did not dispute that the RM1m paid was a deposit. The learned judge in our view, had fallen into error in finding that the amount paid by the appellant were all agreed to by the C appellant as pure deposits.

[26] We have also to bear in mind that despite the label stated or used by the respondent, it does not always necessarily mean what it says. We were guided in D our view by the decision of the Federal Court in *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* which clearly held that label of 'deposit' or 'penalty' does not necessarily means so. It befalls upon the court therefore to construe the same. A penalty or liquidated E damages is a payment stipulated in *terrorem* of the offending party. It has therefore to be decided and determined upon the inherent circumstances of every case.

[27] In forfeiting the payment made, the respondent not only failed to F adduce any evidence to prove that they suffered any damage, they had also failed to prove that the whole sum forfeited was a reasonable compensation which the respondent would be entitled to forfeit, as envisaged by s 75 of the Contracts Act 1950. Far from proving loss the amount imposed to be paid upon extension appeared to be a figure simply plugged from mid air upon the G request made. We said so because when the respondent imposed as a condition for extention of a payment of RM1m for example, it was reduced to RM500,000 at the request of the appellant. If the RM1m imposed represented the loss suffered or a genuine pre-estimated of loss suffered by the respondent then it would be difficult to appreciate why the RM1m could be negotiated H downwards to half. In this regard we were agreeable to accept the submission of learned counsel for the appellant that the payment made or imposed on the appellant would not be a mere deposit. As such s 75 must be adhered to before the respondent became entitled to forfeit them.

I **[28]** Learned author S Santhana Dass on *General Principle of Contract Law* (2nd Ed) at p 7.267 observed that, any sum which has already been paid, other than as earnest money, before a breach, and even though referred to as a 'deposit' under the contract and which is subject to forfeiture under the terms of the contract is not liable to be forfeited per se. Section 75 of the Contracts

Act 1950 may be invoked and a reasonable compensation awarded according to the damage suffered by the vendor as a result of the breach. We therefore were inclined to hold that the amount that was liable to be forfeited by the respondent in this case was only be the RM1m earnest deposit.

[29] We then next dealt with the issue of RM40,000 interest. The learned High Court judge found this payment of interest liable to be forfeited. The RM40,000 interest claimed by the respondent was for the delay in the payment of the total earnest deposit under the SPA which was based on the balance of deposit of RM6m (see p 183 of the core bundle). This interest was imposed on the appellant to pay after a number of extensions granted to execute the SPA. In our view the RM6m deposit was not due to be paid until the SPA is signed. Since the SPA had not been executed, the deposit under the SPA was not due to be paid, as cl 2.6.1 had not kicked in. We therefore agreed with the appellant that the learned judge had erred in allowing the respondent to forfeit the interests of RM40,000 paid.

[30] On the claim of rental and utilities by the appellant, the learned High Court judge at para 33 of his grounds of judgment states his finding as below:

> Further this court cannot agree on the loss purportedly suffered by the plaintiff because of what is supposedly due as rental for 47 months from UTEM to the plaintiff as a result of the termination of the agreement. This is because the sale of the land and properties of the first defendant to NNSB is still subject to all tenancies including the tenancy agreement between the plaintiff and UTEM. This would mean NNSB must still honour the tenancy between plaintiff and UTEM. It is therefore untrue to suggest that plaintiff has suffered the loss of that rental and utilities it had with UTEM. The tenancy is still subsisting even when the land and properties were sold to NNSB.

[31] We agreed with the learned judge's finding on this issue. Since the land was sold subject to tenancies, the appellant's subletting would continue to subsist. With the tenancy subsisting the appellant would continue to collect utility payments from the subtenant and the appellant therefore cannot claim this sum from the respondent. The learned judge was therefore correct in his finding on the counterclaim. We found no appealable error on this issue that warrants appellate interference.

[32] For all the above stated reasons we allowed the appellant's appeal in part. We found the payment of RM3m was not a pure deposit. Thus out of the RM3m paid by the appellant, only RM1m was an earnest deposit. We set aside that part of the order of the High Court. We made a further order for the respondent to refund the balance to the appellant as prayed in para 54(e) of the amended statement of claim. We further found the interest payment of

RM40,000 was not due to be paid and ordered for the refund of the same. The other remaining orders of the High Court were affirmed.

[33] Both my learned brother Prasad Sandosham JCA and my learned sister Zaleha Yusof J have read this judgment in draft, and had expressed their agreement on the same.

Appellant's appeal allowed in part.

Reported by Dzulqarnain Ab Fatar